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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-488

TEXAS GAS TRANSMISSION CORPORATION, *Petitioner*,

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF TEXAS GAS TRANSMISSION CORPORATION

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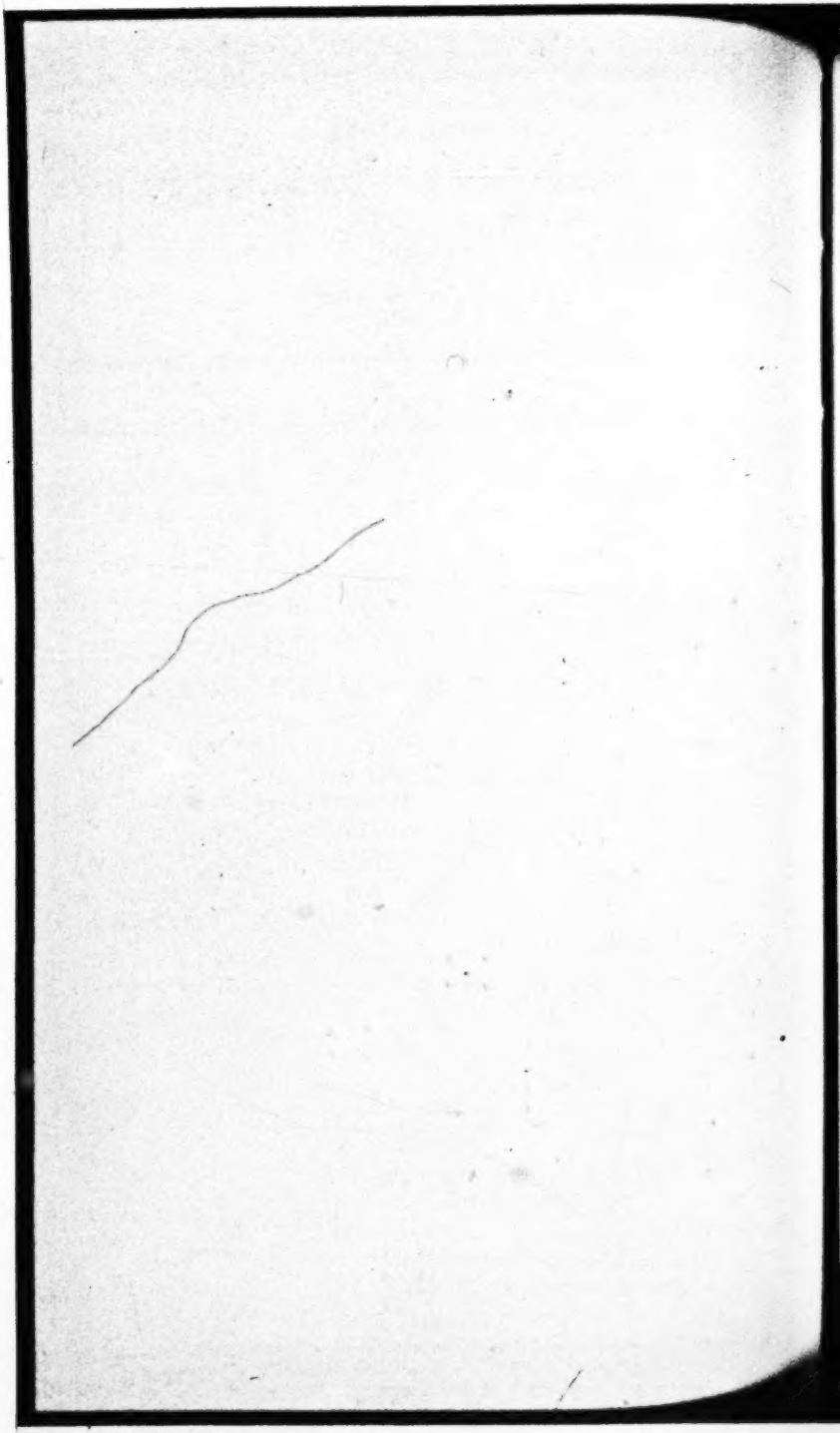

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INTRODUCTION

This Reply Brief is being filed pursuant to Rule 24.4 of the Rules of this Court. Two points have been raised in the briefs in opposition which deserve a reply under that Rule.[1]

[1] Other arguments have been adequately answered in the petitions filed by Texas Gas and the Solicitor General on behalf of the Federal Power Commission in the companion case at No. 72-486. For example, we have shown that the difference in taxes between straight line and normalization is not "pocketed" by the utility, but rather is placed in a restricted reserve to pay future taxes (Texas Gas' Pet. p. 4). We have also shown, contrary to the assertion of New York, that the cost to the consumer under normaliza-

Importance of Question

The first relates to the argument by the Public Service Commission of New York (New York) (Br. in Opp., pp. 9, 10) that the question presented is not of sufficient importance to warrant review by this Court and that, in the past, this Court has consistently rejected efforts to review lower court decisions on the rate effect of liberalized depreciation, citing, *inter alia, Alabama-Tennessee Natural Gas Company* v. *F.P.C.*, 359 F.2d 318 (5th Cir. 1966); *cert. den.*, 385 U.S. 847.

But the question here, however, is far different from the questions presented in the earlier cases cited by New York. In the *Alabama-Tennessee* case, for example, the court of appeals found that the question of normalization versus flow-through with respect to liberalized depreciation was a matter within the *discretion* of the appropriate regulatory agency. In opposing certiorari in that case, the Solicitor General of the United States, on behalf of the Federal Power Commission, stressed this very point (FPC Br. in Opposition in No. 286, Oct. T, 1966, at pp. 7-8):

> "The question of the appropriate treatment for rate-regulation purposes of tax reductions resulting from the use of the liberalized depreciation method is, concededly, a recurring one of general interest and importance in the regulatory com-

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tion would be *less*, not *greater*, than under straight line depreciation since the reserve is deducted from the utility's rate base (Id. p. 9.) We have also demonstrated the invalidity of the "freeze" argument (Id. pp. 15, 16); even the court below found that under both the House and Senate versions of Section 441, the Commission action would have been clearly justified despite the presence of "freeze" language in the House and Senate Reports. (Ibid.)

munity; and the present case represents a change in the thinking of the Federal Power Commission on the subject. Nevertheless, we do not think that the case calls for further review by this Court. The issue of flow-through v. normalization is basically one for resolution through the exercise of administrative discretion. When certiorari was sought in 1961 by the State of California, in the *El Paso* case, to review the Commission's earlier choice of normalization over flow-through, we stated:

> "* * * Such a choice is not one which warrants review by this Court. Under the same principle, the choice is one which can be changed by the Commission should it become convinced the other method is preferable. * * * [*California* v. *Federal Power Commission*, 366 U.S. 912, O.T. 1960, No. 599, Brief in Opposition for Federal Power Commission, pp. 11-12]'."

In the instant cause, the Commission had undertaken to exercise the administrative discretion which it clearly had, previously, and which it believed was unimpaired by the enactment of the Tax Reform Act of 1969. However, the court below has held that the enactment of Section 441 of that Act operated to withdraw and destroy the Commission's discretion to permit changes in tax depreciation practices for rate making purposes. Thus, we are not concerned here with just a tax question. Rather, we are concerned with the survival of the discretionary powers of regulatory agencies to exercise their expertise in regulating utilities subject to their jurisdiction. And in this regard, it is our position that neither the Tax Reform Act nor its legislative history provides any basis for the holding of the court below that Congress withdrew and eliminated such agency discretion. Patently, therefore, the

question presented in the instant cause is substantially different than the question as presented in earlier cases involving liberalized depreciation.

The question whether Congress has withdrawn this Commission discretion is of particular importance at this time when there is a critical shortage of natural gas in the United States,[2] and it is imperative that the Commission have wide latitude in the use of its expertise in the selection of the course best designed to alleviate that shortage.[3] Accordingly, any holding that such discretion of regulatory agencies has been withdrawn should be made only on the basis of a most clear expression of Congressional intent. Here, there is no such expression of Congressional intent; to the contrary, the legislative history, properly read, clearly demonstrates the intent of Congress to fully preserve this administrative discretion.[4]

Congressional Rejection of FPC Proposal To "Require" Utilities To Shift To Straight Line Depreciation

The second point relates to the argument of Memphis Light, Gas and Water Division (Memphis) that the action of the Commission "... treats the customers as if the utilities were on a straight-line basis, a proposal expressly rejected by Congress." (Br. in Op., p. 8). This is Memphis' principal argument and it is

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[2] *F.P.C.* v. *Louisiana Power and Light Co., et al.*, decided June 7, 1972 (Slip Op., p. 4, fn. 2).

[3] While the reserve for deferred taxes (fn. 1, p. 1, *supra*) cannot be reflected as income, the funds can be used, on an interim basis, for general corporate purposes such as exploration and development of gas reserves; the construction of facilities to acquire new gas reserves, etc.

[4] Texas Gas' Pet. pp. 6, 7; FPC Pet. pp. 6; 11-14.

based upon the suggestion which the Federal Power Commission (Commission) made to the Congress which would *require* all utilities to use straight-line depreciation.[5] Since the Commission's suggestion, in this respect, was rejected by Congress, Memphis argues that the position of the Commission in the instant cause is precisely what Congress was trying to avoid.

But, contrary to Memphis' argument, the effect of the Commission's order here is not to revive the suggestion, made by the Commission and rejected by Congress. Memphis overlooks the fact that, whereas the Commission's suggestion would require *all* utilities to shift to straight line depreciation, no such requirement would be imposed under the Commission's reading of Section 441 of the 1969 Tax Reform Act. To the con-

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[5] There can be no dispute that the suggestion which the Congress turned down was one which would *require all* utilities to use straight-line depreciation:

Senate Finance Committee Report:

"• • • On the other hand, a rule *requiring* all such utilities to shift to straight line depreciation would place regulated utilities at an unfair competitive disadvantage, both in terms of the sale of their products or services and their attractiveness to equity investors. U.S. Code Cong. & Ad. News, Vol. 2, 1969, p. 2204." (Emphasis supplied.)

House Finance Committee Report:

"Consideration has been given to suggestions by the Federal Power Commission and others that regulated utilities *no longer be permitted* to use a method of depreciation other than straight line. However, your committee concluded that, in too many cases, this would place regulated utilities at an unfair competitive disadvantage, both in terms of the sale of their products or services and their attractiveness to equity investors. Also, this would result in prompt, substantial, and widespread utility rate increases. U.S. Code Cong. & Ad. News, Vol. 2, 1969, p. 1783" (Emphasis supplied).

trary, as is manifest from Opinion 578 and 578-A here involved, Texas Gas was *permitted* to change to liberalized depreciation with normalization (not straight-line depreciation) because the Commission, in the exercise of its discretion, found that in the circumstances involved, such a change would serve the public interest. Since such ruling may not be applicable in different circumstances or binding upon the other administrative agencies regulating the other utilities subject to the provisions of Section 441, the Commission's action in the instant cause is patently not comparable to the rejected suggestion.

Respectfully submitted,

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